

February 6, 2024

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**Electronically Filed**

Jeff Killip, Executive Director and Secretary  
Washington Utilities and Transportation Commission  
621 Woodland Square Loop SE  
Lacey, Washington 98503

**Re: Puget Sound Pilots Tariff Revision  
Docket TP-220513**

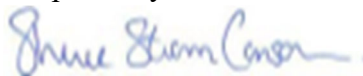
Dear Director Killip:

Final Order 08 in the above referenced docket requires the Puget Sound Pilots (PSP) to file status updates regarding the Multiple Employer Plan (MEP) pension transition process every 60 days, beginning from the effective date of the Order. This letter provides PSP's third status report and updates the Commission of activity that has occurred since the last status report was filed on December 8, 2023.

On December 22, 2023, PSP submitted a request for an advisory opinion to the U.S. Department of Labor (DOL) regarding PSP's status as a plan sponsor of the MEP. Pursuant to Paragraph 212 of Final Order 08, a final version of the letter to DOL is provided as Attachment A to this status report. PSP is continuing to work through details of its MEP and has not yet submitted a Determination Letter Request to the IRS.

PSP will keep the Commission apprised regarding this process in subsequent compliance filings.

Respectfully,



Sheree S. Carson

SSC:aes  
Enclosures  
cc: All Parties

# **Attachment A**

December 22, 2023

Bruce J. McNeil  
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**Via Certified Mail – Return Receipt Requested**

U.S. Department of Labor  
Employee Benefits Security Administration  
Office of Regulations and Interpretations  
Office Director Joe Canary  
200 Constitution Avenue, NW, Suite N-5655  
Washington, D.C. 20210

***Re: Puget Sound Pilots Association Multiple Employer Defined Benefit Pension Plan***

Dear Reader:

Pursuant to ERISA Procedure 76-1, this is a request made on behalf of the Puget Sound Pilots Association for an advisory opinion to specifically address: (i) whether the Puget Sound Pilots Association may be considered to be a “bona fide group or association of employers” so that it is identified as an “employer” within the meaning of section 3(5) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), for purposes of establishing and maintaining a tax-qualified multiple employer pension plan in accordance with 29 C.F.R. section 2510.3-55(a) and section 2510.3-55(b), 84 Fed. Reg. 37508 (published on July 31, 2019, effective September 30, 2019) for the benefit of the Puget Sound pilots; and (ii) whether a Puget Sound pilot, a self-employed individual who forms a limited liability company (“LLC”), treated as a partnership, or another corporate entity that receives earned income for services performed by a pilot as a pilot, may be considered to be a “working owner” of a trade or business without common law employees as defined in section 2510.3-55(d) and an “owner-employee” under section 401(c) of the Internal Revenue Code of 1986, as amended (the “Code”) and qualify as both an employer and an employee of the trade or business for purposes of the requirements in section 2510.3-55(b).

A. Bona fide group or association of employers

Section 2510.3-55(b) provides that a bona fide group or association of employers capable of establishing a multiple employer pension plan (“MEP”) shall include a group or association of employers that meets the following requirements:

- (i) the primary purpose of the group or association may be to offer and provide MEP coverage to its employer members and their employees; however, the group or association also must have at least one substantial business purpose unrelated to offering and providing MEP coverage or other employee benefits to its employer members and their employees; as a safe harbor, a substantial business purpose is considered to exist if the group or association would be a viable entity in the absence of sponsoring an employee benefit plan, such as promoting common business interests of its members or the common economic interests in a trade or employer community and is not required to be a for-profit activity;
- (ii) each employer member of the group or association participating in the plan is a person acting directly as an employer of at least one employee who is a participant covered under the plan;
- (iii) the group or association has a formal organizational structure with a governing body and has by-laws or other similar indications of formality;
- (iv) the functions and activities of the group or association are controlled by its employer members, and the group’s or association’s employer members that participate in the plan control the plan, requiring control to be present both in form and in substance;
- (v) the employer members have a “commonality of interest” as described in section 2510.3-55(b)(2);
- (vi) the group or association does not make plan participation through the association available other than to employees and former employees of employer members, and their beneficiaries; and
- (vii) the group or association is not a bank or trust company, insurance issuer, broker-dealer, or other similar financial services firm, or owned or controlled by such an entity or any subsidiary or affiliate of such an entity.

Section 2510.3-55(b)(2) describes “commonality of interest” and provides that employer members of a group or association will be treated as having a “commonality of interest” if either: (i) the employers are in the same trade, industry, line of business

or profession; or (ii) each employer has a principal place of business in the same region that does not exceed the boundaries of a single State or a metropolitan area (even if the metropolitan area includes more than one State).

Section 2510.3-55(d)(1) describes the dual treatment of working owners as employers and employees and provides that a working owner of a trade or business without common law employees may qualify as both an employer and as an employee of the trade or business for purposes of the requirements in section 2510.3-55(b), including the requirement that each employer member of the group or association adopting the MEP must be a person acting directly as an employer of one or more employees who are participants covered under the MEP and that the group or association does not make participation through the group or association available other than to certain employees and former employees and their beneficiaries.

Section 2510.3-55(d)(2) defines the term “working owner” to mean any person who a responsible plan fiduciary reasonably determines is an individual:

- (i) who has an ownership right of any nature in a trade or business, whether incorporated or unincorporated, including a partner or other self-employed individual;
- (ii) who is earning wages or self-employment income from the trade or business for providing personal services to the trade or business; and
- (iii) who either: (A) works on average at least 20 hours per week or at least 80 hours per month providing personal services to the working owner’s trade or business, or (B) in the case of a multiple employer plan, has wages or self-employment income from such trade or business that at least equals the working owner’s cost of coverage for participation by the working owner and any covered beneficiaries in any group health plan sponsored by the group or association in which the individual is participating or is eligible to participate.

Section 2510-55(d)(3) provides that the determination under section 2510.3-55(d) must be made when the working owner first becomes eligible for participation in the MEP and continued eligibility must be periodically confirmed pursuant to reasonable monitoring procedures.

The Puget Sound pilots are not employees of the Puget Sound Pilots Association, they are self-employed, independent professionals affiliated by their profession as highly skilled, state-licensed pilots who board oil tankers, cargo vessels, cruise ships and other vessels of various sizes and configurations to guide them safely through the Puget Sound waters in the State of Washington. The Puget Sound Pilots

Association is comprised of all of the working Puget Sound pilots, currently 54, and was formed by the pilots as a formal organization with a Federal Employer Identification Number 91-1170751, managed by the pilots with formal by-laws and a governing body made up of Puget Sound pilots. The Puget Sound Pilots Association schedules the assignments of the pilots for the vessels, negotiates the tariffs used for paying the compensation to the pilots, and sponsors an unfunded, pay-as-you-go or farebox defined benefit pension plan (the “Plan”).

The Plan is not subject to the requirements of ERISA (the participating Puget Sound pilots are independent contractors) and the Plan is not a funded tax-qualified plan described in section 401(a) of the Code. The Plan provides that a retired pilot is entitled to receive a retirement benefit equal to 1.5% of the retired pilot’s “retirement base” multiplied by the number of that pilot’s years of service. The term “retirement base” means an amount equal to the average of the last three years of “distributable net income,” which is the projected annual income for an active pilot as determined from time to time in rate proceedings by the Washington State Utilities and Transportation Commission. All of the Puget Sound pilots are required to participate in the Plan and only the Puget Sound pilots are eligible to participate in the Plan.

The Puget Sound Pilots Association has authorized the adoption of a multiple employer defined benefit pension plan that would be a funded, tax-qualified plan described in section 401(a) of the Code established and maintained by the Puget Sound Pilots Association. The benefit payable under the tax-qualified plan would be substantially identical to the current benefit payable under the current unfunded, pay-as-you-go or farebox defined benefit pension plan. This would be accomplished by adjusting the 1.5% annual accrual rate in the existing defined benefit pension plan by the percentage that the retired pilot's "retirement base" exceeds the limit imposed by section 401(a)(17) of the Code on the amount of annual compensation that is used to calculate a participant’s retirement benefit.

As an illustration, the following example, which uses a general estimate for the final average compensation of a pilot and the 2023 compensation limit, reflects the calculation of the retirement benefit that would be paid under the Plan. For a pilot who retired in 2023 with 20 years of service as an active pilot and an average compensation base over the last three years of his or her career of \$430,000, which exceeds the \$330,000 compensation limit in 2023 imposed by section 401(a)(17) of the Code by 30.303%, the 1.5% annual accrual rate in the existing pension plan would be increased by that percentage to 1.954545% to provide the pension benefit level promised in the existing pension plan. In this example, the 2023 retiring pilot's benefit would be \$129,000 ( $\$330,000 \times 1.954545\% \times 20$ ) on an annual basis, payable in substantially equal monthly installment payments of \$10,750. This simple calculation ensures that Puget Sound pilot retirees receive the level of benefit promised in the existing pension plan with a calculation that adjusts for two

variables: (i) the annual net income figures that make up the retiree's compensation base, and (ii) the annually adjusted compensation limit imposed by section 401(a)(17) of the Code.

Each self-employed Puget Sound pilot would form an LLC which would be treated as a partnership or another corporate entity receiving earned income from the services performed by the state-licensed Puget Sound pilot. The LLC or other corporate entity formed by each pilot would participate in the multiple employer defined benefit pension plan and only the pilots would be eligible to participate in the plan.

A draft of the Puget Sound Pilots Association multiple employer defined benefit pension plan and related trust agreement will be submitted to the Internal Revenue Service, along with IRS Form 8717, with a request for a favorable determination on the tax-qualified status of the plan and trust agreement under sections 401(a) and 501(a) of the Code.

The IRS may request a copy of the advisory opinion issued by the U.S. Department of Labor with respect to the identification of the Puget Sound Pilots Association as an “employer” under section 3(5) of ERISA for purposes of establishing and maintaining the plan and the consideration of each pilot as a working owner of a trade or business without common law employees to be eligible to participate in the plan; consequently, we request an expedited advisory opinion from the U.S. Department of Labor for treating the Puget Sound Pilots Association as an employer under section 3(5) of ERISA and capable of establishing and maintaining a multiple employer defined benefit pension plan and treating each Puget Sound pilot as both an employer and an employee of a trade or business and considered to be a working owner for purposes of participating in the plan.

If you need any additional information or if you have any questions with respect to this request for an advisory opinion, please let me know.

Respectfully submitted,

LEECH TISHMAN FUSCALDO & LAMPL, LLC

  
Bruce J. McNeil